(1) 95-1104

No. _____

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

KENNETH J. OWEN,

Petitioner,

v.

THE STATE BAR OF CALIFORNIA AND
THE COMMITTEE OF BAR EXAMINERS,

Respondent.

On Petition For Writ Of Certiorari
To The
SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

KENNETH J. OWEN
IN PRO PER
6098 Slopeview Court
Castro Valley, CA 94552
Telephone: (510) 582-0540

29 pp

QUESTIONS PRESENTED

I. Did the State of California err by not providing Petitioner some kind of hearing before Petitioner was deprived of his right to practice law in California, in contravention of the Due Process Clause of the Fourteenth Amendment?

II. Is California Business & Professions Code, section 6060(g) invalid as applied, in contravention of the Equal Protection Clause of the Fourteenth Amendment?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner, KENNETH OWEN, respectfully preys that a writ of certiorari issue to review an order of the Supreme Court of the State of California denying a Petition for Writ of Review.

OPINIONS BELOW

No written opinions have been issued in this case. A letter issued by the Committee of Bar Examiners of the State Bar of California appears in Appendix A to this Petition.

JURISDICTION

The Supreme Court of the State of California's Order denying a Petition for Writ of Review was filed on October 4, 1995 and is set forth in Appendix B.

This Court's jurisdiction is invoked under 28 U.S.C. section 1257(a). "A state supreme court's decision on an individual application can be reviewed only by the United States Supreme Court on writ of certiorari. (Citations omitted)" Tofano v. Supreme Court of Nevada, 718 F.2d 313, 314 (9th Cir. 1983).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner ("Owen") attended Oakland College of Law in 1993-1994 and successfully completed one year of law study with a grade point average of 3.0. Petitioner made the Dean's List of Honor Students. Oakland College of Law has been authorized by the State of California to grant Juris Doctorate degrees pursuant to California Education Code, section 94310.

Unfortunately, Oakland College of Law is not accredited by the Committee of Bar Examiners of the State Bar of California ("Committee"). Pursuant to California Business and Professions Code section 6060(g), students attending unaccredited law schools are required to take and pass a First Year Law Students Examination ("FYLSX") administered by the Committee.

Business & Professions Code, section 6060(g) provides in part:

> After completion of his or her first year of law study, have passed a first-year law student's examination given by the examining committee. This requirement does not apply to a student who satisfactorily completes the first-year course of instruction in a law school accredited by the examining committee ... An applicant who is required to take the first-year examination shall not receive

> credit for his or her first year of law study until he or she has passed that examination: nor shall he or she receive credit for any law study subsequent to the first year ...

Petitioner took the June 1994 FYLSX, and received a Total Scaled Score of 537.43. Pursuant to the Rules Regulating Admission to Practice Law in California, Rule VIII, Section 1(b) "The passing grade shall be 70% of the highest possible grade." On the FYLSX, a score of 800 is possible, therefore a score of 560 is passing. According to the Committee, the Petitioner did not pass. Petitioner took the October 1994 FYLSX and received a Total Scaled Score of 537.5. According to the Committee,the Petitioner again did not pass.

In January 1995, Petitioner wrote to California State Assemblymember Sweeney, seeking reconsideration by the Committee of his grades on the FYLSX. On January 23, 1995, the Director of Examinations denied Petitioner's request. Petitioner then formally petitioned the full Committee of Bar Examiners for certification as having passed the FYLSX.

The Committee met secretly in a closed hearing on March 25, 1995. Petitioner was not invited or allowed to attend the hearing. The Committe responded by letter dated March 28,1995, denying Petitioner's request for reconsideration. See Appendix A. Petitioner then timely filed a Petition for Writ of Review in the California Supreme Court.

Pursuant to California Rules of Court, Rule 951(g) and Rule 952(d), the Supreme Court has original and exclusive jurisdiction of attorney admissions and discipline. The issues presented to the California Supreme Court were:

1. Has the Committee committed fraud in the administration of the FYLSX?

2. Has the Committee invidiously discriminated against students attending unaccredited law schools?
3. Has the Committee unlawfully and arbitrarily fabricated scaling formulas for the FYLSX which are designed to fail qualified students?
4. Has the Committee acted in a manner that contravenes the Due Process and Equal Protection Clause of the Fourteenth Amendment?

On October 4, 1995, the Supreme Court of California, without a hearing, summarily DENIED Owen's Petition for Writ of Review. See Appendix B.

REASONS FOR GRANTING THE WRIT

I. DUE PROCESS

The Supreme Court of the State of California abused its discretion by not providing the Petitioner the most basic of hearings to resolve Petitioner's complaint. The issues presented to the Committee and Supreme Court were essentially that the Committee was guilty of illegally, erroneously, and fraudulently administering the FYLSX. Owen provided an overwhelming amount of evidence to support these allegations. (12 page Petition for Review to Supreme Court, supported by a 98 page Record on Review).

Owen believed that a "fair trial in a fair tribunal [was] a fundamental right of Due Process. (citation omitted). This applies to administrative agencies which adjudicate as well as to courts. (citation omitted). Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' (citation omitted)" Withrow v. Larkin, 421 U.S. 35,46-7(1975)

The main issue before this Court is not the merits of the underlying case,but the lack of any meaningful judicial adjudication being provided Petitioner in the State of California. Petitioner is confident that he would prevail on the merits if he were given a hearing. "[T]he right to a hearing does not depend on a demonstration of certain success. (citation omitted)" Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 544 (1985).

Unfortunately, the only court in the State of California with jurisdiction to hear this case has declined to listen to the Petitioner's complaint.

> Determinations and recommendations of the bar in matters of discipline and admission are directly reviewable in this court. Rule 952 of the Rules of Court describes the means by which such review may be sought. . . . "A petition to the Supreme Court to review any other action of the Board of Governors of the State Bar, or of any board or committee appointed by it and authorized to make a determination pursuant to the provisions of the State Bar Act, shall be filed within 60 days after written notice of the action..." (Subd. (c).) (emphasis added)
> Saleby v. State Bar of California, 39 Cal.3d 547, 557-58 (Cal. 1985)

The problem in this case is that the Committee has issued no findings of fact, and the Supreme Court has provided no hearing to review the Committee's illegal actions. For some unexplained reason, the Supreme Court ignored its own precedents in this particular case:

> We conclude that in order to comport with due process requirements applicants must be afforded an opportunity to be heard and respond to the bar's determinations and the bar

must issue sufficient findings to afford review.

The opportunity to be heard is "a fundamental requirement of due process." (emphasis added)

Saleby v. State Bar of California, 39 Cal.3d 547, 565 (Cal. 1985)

In a letter dated March 28, 1995, the Committee "concluded that there were no arithmetic or clerical errors in the calculation of [Petitioner's] examination grade nor was there any evidence of departure from established grading procedures." See Appendix A.

This conclusion is not sufficient as findings to afford any meaningful review, and is nothing more than a denial of Petitioner's allegations without any evidence to support the Committee's position.

In this case, the process Petitioner received was a determination by the Committee that it did no wrong, and then a denial of any judicial review of that determination by the Supreme Court. Even the Supreme Court of California would have to concede that those procedures do not comport with the fundamental requirements of due process.

After reviewing federal precedent, we held that "the due process safeguards required for protection of an individual's statutory interests must be analyzed in the context of the principle that freedom from arbitrary adjudicative procedures is a substantive element of one's liberty. [Citation.]" (emphasis added)

Saleby v. State Bar of California, 39 Cal.3d 547, 565 (Cal. 1985).

A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause

of the Fourteenth Amendment. (emphasis added)
Schware v.Board of Bar Exam of State of N.M.,
353 U.S. 232, 238-239 (1957)
And when Congress has given an administrative agency discretion to determine its own procedure, the agency has rarely chosen to dispose of the rights of individuals without a hearing, however informal.16/

The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret,one-sided determination of facts decisive of rights. 17/ (emphasis added)
Joint Anti-fascist Refugee Committee v. McGrath,
341 U.S.123, 168-170 (1951)
Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government,that

justice has been done.19/ (emphasis added) Id. at 171,172

[T]hree principles of "natural justice" were stated to be that "a man may not be a judge in his own cause," that "No party ought to be condemned unheard," and that "a party is entitled to know the reason for the decision." Report of Committee on Ministers' Powers, Cmd. 4060, pp 75-80. Id. at 170, n.17.

Petitioner accused the Committee of fraud, discrimination, and improper grading procedures with respect to the administration of the FYLSX. The Committee acted as the judge in its own cause. The Committee conducted a secret hearing in which the Committee condemned the Petitioner unheard. The Committee provided no reason for its decision. The Committee's actions clearly contravene the Due Process Clause of the Fourteenth Amendment. To add insult to injury,the Supreme Court of California then refused to review the Committee's actions.

The purpose of due process in this context is to assure that the bar acts within its discretion, i.e., in a nondiscriminatory and nonarbitrary manner. (Cf. Perry v. Sindermann, supra, 408 U.S. at p. 597, 92 S.Ct. at P. 2697 [government may not deny benefit to person on basis "that infringes his constitutionally protected interests"].)

Saleby v. State Bar of California, 39 Cal.3d 547, 568 (Cal. 1985)

Finally, appellant is entitled to a statement of the final decision and reasons therefor in writing. (See In re Sturm (1974) 11 Cal.3d 258, 268-270, 113 Cal.Rptr. 361, 521 P.2d 97.) "Fundamental to the concept of procedural due process is the right to a reasoned explanation of gov-

ernment conduct that is contrary to the expectations the government has created by conferring a special status upon an individual. The very essence of arbitrariness is to have one's status redefined by the state without an adequate explanation of its reasons for doing so. . . [T]he respect for individual autonomy that is at the foundation of procedural due process imposes a distinct obligation upon the government to explain fully its adverse status decision." (citation omitted)(emphasis added)

People v. Ramirez,
25 Cal.3d 260, 276 (Cal. 1979)

The failure to make findings following formal administrative adjudication is fundamentally unfair because an already recognized right of access to a reviewing court is impaired thereby. (citation omitted)

In re Strum,
11 Cal.3d 258, 267 (Cal. 1974)

"The right to practice one's profession is sufficiently precious to surround it with a panoply of legal protection. (citation omitted)" Emslie v. State Bar of California, 11 Cal.3d 210, 226 (Cal. 1974). Why no hearing was ever provided is puzzling and deeply disturbing. What happened in this case? Petitioner clearly expected to prevail on the merits of his complaint. By not providing Petitioner with a reasoned explanation, the Supreme Court of California has acted in a discriminatory and arbitrary manner. Justice has not occurred in this case.

The Supreme Court of California abused its discretion by summarily denying review of the Committee's actions. "A state court may not,in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred

issues raised in the same manner." Williams v. State of Georgia, 349 U.S. 375, 383 (1955). "Meaningful review requires that the reviewing court should review." Kent v. United States, 383 U.S. 541, 561 (1966) "The supremacy clause of the federal Constitution precludes a state court from arbitrarily refusing to consider 'federal questions' of law." In re Panchot, 70 Cal.2d 105, 107, n.4 (Cal. 1968).

The deprivation of a license to practice law has serious consequences. Petitioner has spent a year in the study of law as well as a great deal of money in preparation to be a lawyer. But for the illegal and discriminatory actions of the Committee, Petitioner believes that he has passed the FYLSX. It is absurd that the State of California would deny Petitioner due process in this situation.

If Petitioner were charged with a minor Vehicle Code infraction, he would have the right to a trial in the Traffic Division of the Municipal Court. Petitioner would also have appeal rights to the Appellate Division of the Superior Court. If Petitioner had a $100 contract dispute, he would have judicial recourse in the Municipal Small Claims Court as well as appeal rights for the defendant in the Superior Court.

Petitioner has spent thousands of dollars in tuition and books. Petitioner has also spent over a thousand hours of classroom and home study during his first year of law school. The Committee refuses to Certify that the Petitioner has passed the FYLSX. Yet under these circumstances, Petitioner has no right to a hearing or trial. This is unconscionable as well as unconstitutional.

II. EQUAL PROTECTION

California Business & Professions Code section 6060(g)is invalid as applied. Although the statute is neutral on its face the Committee administers the FYLSX in a discriminatory manner which violates the Equal Protection Clause of the Fourteenth Amendment.

Admission to practice law is an exercise of one of the inherent powers of the California Supreme Court. Merco v.Constr. Engineers, Inc. v. Municipal Court, 21 Cal.3d, 724, 727-29 (Cal.1978). The State Bar is a public corporation established in the judicial branch of government (California Const., art. VI, section 9; Business & Professions Code, section 6001).

The State Bar of California acts as an administrative arm of the California Supreme Court in matters concerning attorney admissions and discipline and the regulation of the practice of law in the state. In re Lacey, 11 Cal.2d 669, 701 (Cal. 1938). To assist the Supreme Court in the admission process, the Board of Governors of the State Bar, pursuant to Business & Professions Code, sections 6046 and 6046.5, has appointed the Committee to Act as the administrative arm of the Supreme Court in admission matters. In re Admission to Practice Law, 1 Cal.2d 61, 67 (Cal. 1934).

The Committee has the power to: (a) examine all applicants for admission to practice law; (b) administer the requirements for admission to practice law; and (c) certify to the Supreme Court for admission those applicants who fulfill the statutory requirements. Business & Professions Code, section 6046. Moreover, the Committee has the power to adopt such reasonable rules and regulations as may be necessary or advisable for the purpose

of making effective the requirements for admission. Business & Professions Code, section 6047.

The requirements for admission to practice law in the State of California are delineated in Business & Professions Code, section 6060. Included in both the Business & Professions Code and the Committee's rules is the requirement that first year students at unaccredited law schools take and pass the FYLSX. Business & Professions Code, section 6060(g).

One of the primary purposes of the FYLSX is to give applicants some indication of the quality of their legal education, so they can measure their likelihood of success on the general bar examination.

> There is a strong public policy in the requirement of the FYLSX. It serves a dual purpose of protecting persons who are ill-suited for a legal career from continuing to spend time, money and effort following completion of a one-year study in an effort that has little chance of success, and it affords persons who are better qualified for a legal career an opportunity to measure the quality of their training and education after the first-year study to better prepare themselves for the general bar examination.6/
>
> Bib'le v. Committee of Bar Examiners 26 Cal.3d 548, 554(Cal.1980),cert. denied, 559 U.S. 860 (1980).

Although it would appear that the FYLSX serves a legitimate state interest, the Committee has been administering the FYLSX in a fraudulent and illegal manner. "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal

hand,so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." Yick Wo v. Hopkins, 118 U.S. 356, 373, 374 (1886).

The Rules Regulating Admission to Practice Law in California as well as the Instructions for Applicants First Year Law Students' Examination state that a 70% is a passing grade. Rule VIII, section 1(b). Only after taking the FYLSX and receiving his score, did Petitioner realize that the Committee had scaled his test score downward. Only after taking the test did Petitioner realize that applicants who take the FYLSX are given only 52.5 minutes per essay question, whereas General Bar Examination applicants are given 60 minutes to answer similar essay questions.

Upon further investigation, Petitioner discovered that for the past 8 years the average score on the FYLSX has been scaled downward by more than 3%, whereas the scores on the General Bar Examination have been scaled upward by more than 9%.

Petitioner suggests "that the Committee was engaging in improper grading in order generally to restrict admissions." Chaney v. State Bar of California, 386 F.2d 962,967 (9th Cir. 1967). The average pass rate for the past 15 FYLSXs has been under 25%. The average pass rate for the past 15 General Bar Examinations has been over 52%. Those numbers might suggest that students from unaccredited law schools are not as qualified as those who attend accredited law schools.This is nothing more than an illusion created by the Committee's invidiously discriminatory application of fabricated scaling formulas to the FYLSX.

> Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory. Cf. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220.
>
> Schware v. Board of Bar Exam. of State of N.M.,
>
> 353 U.S. 232, 239 (1957).

It was also pointed out to the Committee that there is no legal authority to scale the FYLSX. Business & Professions Code, section 6046.6(d) provides:

> Scaling may be used on the bar examination for the purpose of maintaining an examination of uniform difficulty from year to year. (emphasis added)

> We must assume that the Legislature meant the section to be read as it was written ... We cannot create ... an offense be enlarging the statute, or by inserting or deleting words, nor should we do so by giving a false meaning to its word. [Citations.] Such practice makes it impossible for anyone to rely on the written word of the Legislature and only adds confusion to the already difficult task of drafting statutes. (citations omitted)
>
> People v. Baker,
>
> 69 Cal.2d 44, 50 (Cal. 1968)
>
> When the Legislature "has employed a term or phrase in one place and excluded it in another,it should not be implied where excluded." (citations omitted)
>
> Pasadena Police Officers Assn.v.City of Pasadena,
>
> 51 Cal.3d 564, 576 (Cal. 1990)

Two of the requirements for admission to practice law in California are Business &

Professions Code, sections 6060(f) and 6060(g) which provide in part:

> (f) Have passed a final bar examination given by the examining committee. (emphasis added)
>
> (g) [H]ave passed a first-year law student's examination given by the examining committee.(emphasis added)

If the Legislature had intended scaling to be used on the FYLSX, the Legislature would have explicitly included the term in Business & Professions Code, section 6046.6(d). The Legislature could have written the statute to read:

> Scaling may be used on both the bar examination and first-year law student's examination for the purpose of maintaining an examination of uniform difficulty from year to year.

"We must assume that the Legislature meant the section to be read as it was written." People v. Baker, 69 Cal.2d 44, 50 (Cal. 1968). The Committee cannot enlarge the statute by implication. The Committee cannot imply that section 6046.6 applies to the first-year law student's examination, when the Legislature has deliberately excluded the term from the statute.

It is therefore illegal to scale the FYLSX. Any scaling formula that is applied to the FYLSX is void and of no effect. Every score that is based on a void scaling formula will result in an arithmetical error in the calculation of the total multiple-choice score.

The illegality of scaling the FYLSX was pointed out to the Committee in Owen's Petition to the full Committee on February 28, 1995. "When an official with the authority to rectify an erroneous practice receives notice of the wrongful practice and its harmful consequences, due process requires the state to provide a hearing before a further denial of

liberty can be said to be free from section 1983 liability." Haygood v. Younger, 769 F.2d 1350, (9th Cir. 1985). Since then, the Committee has continued to apply scaling formulas to the June 1995 as well as October 1995 FYLSX. Apparently, the Committee is not bound by the statute.

Not only is the Committee illegally scaling the FYLSX downward, but the Committee has arbitrarily fabricated the scaling formulas without any regard to established mathematical principles.

The purpose of the scaling formulas as stated by the Committee is to "ensure that the same score achieved on different administrations of the examination will have the same meaning ... The process involves the use of questions from a previous form of the examination on the new form of the examination, comparing the performance of the examinees on those questions on the previous and current administration to determine what adjustments, if any, must be made to make the scores on the new test comparable to those on the old, and making such adjustments."

Because no two versions of the FYLSX are identical, there is a separate scaling equation for each administration of the examination. Given the number of applicants who take the FYLSX each year, it is mathematically impossible to ever have identical formulas.

Upon investigation, Petitioner discovered that there were only four scaling formulas for the past 15 administrations of the FYLSX. These formulas appear in the same sequence, and repeat every two years. In other words, the formula (3.33 xRaw)+31 will occur every June of even numbered years. The formula (2.6xRaw)+90 will occur every June of odd numbered years.

It would be impossible to predict a scaling formula in the future because the test scores of the future FYLSX would have to be known in advance. Based on the arbitrarily chosen pattern of scaling formulas established by the Committee, Owen, in his Petition to the full Committee on February 28,1995, predicted that the scaling formula for the June 1995 FYLSX would be (2.6xRaw)+90. Amazingly, the scaling formula for the June 1995 FYLSX was (2.6xRaw)+90. The October 1995 scaling formula followed the same arbitrary pattern and was easily predictable.

The FYLSX scaling formulas generally lower the applicant's score. The scaling formulas do not "ensure that the same score achieved on different administrations of the examination will have the same meaning." The scaling formulas are arbitrarily chosen and have no rational basis to the actual performance of the examination.

The only logical conclusion then, is that the Committee has been dealing from the bottom of the deck when it comes to the FYLSX. The illegal and manipulative administration of the FYLSX by the Committee has deprived hundreds of qualified students from obtaining a legal education at unaccredited law schools.

On the other hand, it would be difficult for an applicant taking the General Bar Examination to complain that his score was scaled upward by more than 10%. A General Bar Applicant who received an actual score of 65% on the July 1994 examination would have received a scaled score of 72%, would have passed the Bar, and would now be practicing law in the State of California.

The FYLSX flies in the face of its "purpose of protecting persons who are ill-suited for a legal career." Bib'le

v. Committee of Bar Examiners, 26 Cal.3d 548, 554(Cal.1980) The Petitioner is well suited for a legal career. The question is, who is going to protect Owen from the illegal and discriminatory actions of the Committee of Bar Examiners?

Another example of discrimination is demonstrated in The Rules Regulating Admission to Practice Law in California, Rule VIII, section 1(e):

> An exempt general applicant who is unsuccessful on the First-Year Law Students' Examination is not subject to any of the sanctions, requirements, or law study credit limitations which are otherwise imposed by this Rule on an unsuccessful applicant who is required to take the the First-Year Law Students' Examination.

In other words, a student who attends an ABA accredited law school, or a California law school accredited by the Committee will receive credit for first-year law studies even though the applicant fails the FYLSX. The applicant will be able to receive credit for subsequent law studies, and the applicant will be given the opportunity to take the General Bar Examination in spite of failing the FYLSX.

It is interesting that the Committee would use the term sanctions. The FYLSX is a sanction against the student because he or she chose to attend a law school that has not been blessed by the Committee.

The Committee began to compile general statistics beginning with the June 1995 FYLSX. Of the 619 applicants that took the test, 150 or 24.2% passed.

> 13 applicants from ABA accredited law schools took the test. 0 passed or 0%
> 214 applicants from law schools accredited by the Committee took the test. 46 passed or 21.5%

377 applicants from unaccredited law schools took the test.

103 passed or 27%

It should be obvious that students from unaccredited law schools have the highest pass rate on the FYLSX. Students from unaccredited law schools who fail the FYLSX do not receive any credit for their efforts, whereas students from ABA accredited law schools and law schools accredited by the Committee are not subject to any sanctions.

There can be no rational basis for punishing students merely because they chose to attend an unaccredited law school. The Committee has been using difficult FYLSXs and unfair low passing rates to eliminate unaccredited law schools. They failed 84% of the applicants on the October 1994 FYLSX and about 76% on the June 1995 FYLSX. When so many well-educated students fail an exam, the exam and its grading become more suspect than those being examined. By denying schools upper class students, the schools cannot continue and are forced to close.

The final example of irrationality is contained in the Committee's Brief For Respondent filed with the Supreme Court in this matter on May 30,1995:

> "By requiring petitioner to take and pass the FYLSX, Respondent is in no way discriminating against him or preventing him from obtaining a legal education. Petitioner may still continue to pursue his studies and complete the Juris Doctor program at Oakland College of Law, only his earned units will not at this time be credited toward acceptance to practice law in California."

Because of this statement, Petitioner, as well as other students, have re-enrolled at Oakland College of Law. The Committee's current position is now at odds with the purpose of the FYLSX. One

of the purposes of the FYLSX is to protect persons who are ill-suited from a legal career from continuing to spend time, money and effort following completion of a one-year study in an effort that has little chance of success.

Petitioner is, however quite successful in law school. Petitioner will continue to spend thousands of hours, as well as a considerable amount of money and effort to obtain a Juris Doctorate degree from Oakland College of Law. The Petitioner could, in effect, graduate as the valedictorian and still not be able to take the General Bar Examination or practice law. The FYLSX sanction makes no sense.

> Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire <u>useful knowledge</u>, . . . The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. (emphasis added)
>
> <u>Meyer v. State of Nebraska</u>, 262 U.S. 390, 399-400 (1923)

How useful is a Juris Doctorate degree if you can't practice law? But for the Committee's illegal and discriminatory administration of the FYLSX, Petitioner has in fact passed. General Bar participants are given 14.29% more time to answer similar essay questions.

If the Committee adds 14% to Petitioner's essay score, and puts back the points it took when they illegally scaled his multiple-choice score downward, Petitioner would have received a score of 592

or 74%, which is clearly passing. Raw scores for the General Bar Examination in the 74% range are considered to be in the top 2 percentile.

In spite of the Committee's interference, under the guise of protecting his interest, Petitioner believes that he has a good chance of passing the General Bar Examination. All Petitioner is asking for is the chance.

CONCLUSION

Business & Professions Code, section 6060(g) should be declared void as applied, in contravention of the Equal Protection Clause of the Fourteenth Amendment.

In the alternate, this case should be remanded to the Supreme Court of California for "some form of hearing."

> As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that "some form of hearing" is required before the owner is finally deprived of a protected property interest. (citation omitted)(emphasis in original)
>
> Logan v. Zimmerman Brush Co.,
> 455 U.S. 422, 433 (1982)
>
> [A] state or its political subdivision has the authority--indeed the "constitutional duty," (citation omitted) (emphasis original) to ascertain whether it is denying its citizens equal protection of the laws and, if so, to take corrective steps.
>
> Assoc. Gen. Contr. of Cal. v. City & County of S.F.,
> 813 F.2d 922, 929 (9th Cir. 1987)

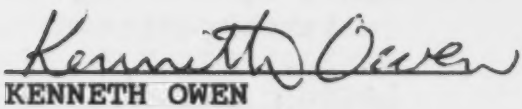
The Committee's actions are arbitrary, unreasonable, and are not supported by the evidence. Furthermore,the Committee's actions constitute a denial of Petitioner's constitutional rights under the Due Process and Equal Protection Clause of the Fourteenth Amendment.

The California Supreme Court Order denying the Petition for Writ of Review is arbitrary, unreasonable and not supported by the evidence. Furthermore, the Court's decision constitutes a denial of Petitioner's constitutional rights under the Due Process and Equal Protection Clause of the Fourteenth Amendment.

For the reasons set forth above,a writ of certiorari should issue to review the Order of the Supreme Court of California in this matter.

DATED: January 2, 1996

Respectfully submitted,



KENNETH OWEN

THE COMMITTEE OF BAR EXAMINERS OF
THE STATE BAR OF CALIFORNIA
OFFICE OF ADMISSIONS

1149 SOUTH HILL STREET
LOS ANGELES, CALIFORNIA 90015
(213) 765-1500

March 28, 1995

Assigned Petition No.A(3)
Registration No. 557709551

Kenneth Owen
6098 Slopeview Court
Castro Valley, CA 94552

Dear Mr. Owen:

During its meeting on March 25, 1995, the Committee of Bar Examiners(Committee) took up consideration of your request for reconsideration of scores you received on your October 1994 First-Year Law Students' Examination and certification of having passed said examination. The Committee reviewed your correspondence with the Honorable Michael Sweeney, Assemblymember, and Adam Ferber, Director for Examinations, and concluded that there were no arithmetic or clerical errors in the calculation of your examination grade nor was there any evidence of departure from established grading procedures. The Committee therefore declined to reconsider your examination score for the October 1994 administration of the First-Year Law Student's Examination.
I am afraid that this is the final Committee decision, and is not subject to further administrative review.

Sincerely,
"s/JOHN R. RODRIQUEZ"
John R. Rodriquez
Director
Operations and Management

APPENDIX A

SUPREME COURT FILED
OCT 4-1995
Robert Wandruff Clerk
DEPUTY

S046472

IN THE SUPREME COURT OF CALIFORNIA

KENNETH J. OWEN, Petitioner

v.

COMMITTEE OF BAR EXAMINERS, Respondent

Petition for writ of review DENIED.

"s/LUCAS"
Chief Justice

APPENDIX B

Supreme Court, U.S.
FILED
FEB - 9 1996
CLERK

No. 95-1104

In The

Supreme Court of the United States

October Term, 1995

KENNETH J. OWEN, *Petitioner,*

vs.

THE STATE BAR OF CALIFORNIA, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

DIANE C. YU, S.B. #78676
RICHARD J. ZANASSI, S.B. #105044
COLIN P. WONG, S.B. #130033*
555 Franklin Street
San Francisco, California 94102
Telephone: (415) 561-8200

Attorneys for Respondent

*Counsel of Record

QUESTIONS PRESENTED

1. Whether the State Bar of California's procedure for reviewing unsuccessful applicants taking the First Year Law Students Examination denies petitioner Due Process?

2. Whether the allegations of fraud by Petitioner in the administration of the First Year Law Students Examination by the Committee of Bar Examiners of the State Bar of California violates the Equal Protection Clause raising an important federal question which should be decided by this Court?

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STATEMENT OF THE CASE

Petitioner, Kenneth J. Owen, an unsuccessful applicant in the June 1994 and October 1994 First Year Law Students Exam ("FYLSX"), is seeking review by this Court due to his failure to pass the FYLSX as administered by the Committee of Bar Examiners (hereinafter, "the Committee") of the State Bar of California (hereinafter, "State Bar"). Passage of the examination would have entitled Petitioner to receive credit for his first year law study at Oakland Law School, an unaccredited law school in Oakland, California.

The State Bar of California and its Committee of Bar Examiners (hereinafter referred to collectively as "Respondent"), respectfully submits that for the reasons set forth herein, the petition should be denied.

In January 1995, Petitioner wrote to Assembly member Michael Sweeney for the Eighteenth Assembly District, seeking reconsideration by the Committee of Bar Examiners of his grade on the June 1994 FYLSX. (Petition,

p. 3.) On January 23, 1995, Adam S. Ferber, Director for Examinations for the Committee of Bar Examiners responded to Petitioner's request by letter explaining the Committee's reasons for denying his request.

Petitioner then formally petitioned the full Committee of Bar Examiners for reconsideration of the results of his June 1994 FYLSX. The Committee responded by letter dated March 28, 1995, denying his request for reconsideration. (Petition, p. 3.) On April 9, 1995, Petitioner wrote to Adam S. Ferber requesting information regarding scaling formulas applied to the June 1986 through October 1994 FYLSX, to support his petition to the California Supreme Court. Mr. Ferber responded on behalf of the Committee by letter dated April 12, 1995, denying Petitioner's request.

On or about May 10, 1995, Petitioner filed a petition with the California Supreme Court. On October 4, 1995, the Court denied the petition. Petitioner then filed the instant petition for Writ of Certiorari on January 2,

1996. In his petition, Petitioner questions the procedure adopted by the Committee in arriving at the scaled scores that comprise his final grade on the FYLSX. Petitioner claims that the procedure used by the Committee is fraudulent, unlawfully and arbitrarily fabricated and results in the discriminatory treatment of students attending unaccredited law schools, in violation of the Due Process and Equal Protection Clauses of the United States Constitution. Petitioner's final scaled grade on the June 1994 FYLSX was 537.4300. The minimum passing scaled grade for this examination was 560. Petitioner's final scaled grade on the October 1994 FYLSX was 537.5000. The minimum passing scaled grade for this examination was 560.

Respondent submits that the Committee reviewed both Petitioner's request for reconsideration and petition for certification in accordance with established Committee policies and procedures adopted pursuant to the Rules Regulating Admission to Practice Law in California; that

the Committee responded to Petitioner's requests for information to the extent allowed under its disclosure policy; that Petitioner's contentions regarding the scaling formulas applied to the FYLSX are without merit; and that Petitioner's examination was graded in accordance with established grading and scaling procedures.

Petitioner's contentions are: (1) that the Committee has acted fraudulently in scaling the FYLSX grades, (2) that application of the scaling formula to the FYLSX results in discrimination against law students taking the FYLSX, (3) that the scaling formula is unlawful and erroneous, and (4) that the Committee's actions with regard to his petition for certification contravene the Due Process and Equal Protection clauses of the Fourteenth Amendment of the United States Constitution. Respondent submits that it at all times acted properly and within its authority in conducting the FYLSX and in reviewing Petitioner's petition.

REASONS FOR DENYING THE WRIT

1. Petitioners' Failure To Pass The First Year Law Students Examination Did Not Deprive Him Of His Due Process Rights

A. The Committee's Interpretation And Enforcement Of The State Bar Act Is Entitled To Great Weight.

In California, admission to the practice of law is an exercise of one of the inherent powers of the California Supreme Court. (Merco Construction Engineers, Inc. v. Municipal Court (1978) 21 Cal. 3d 724, 727-729; Stratmore v. State Bar (1975) 14 Cal. 3d 887, 889; Brydonjack v. State Bar (1929) 208 Cal. 439; People v. Turner (1850) 1 Cal. 143, 150; see Cal. Const., art. VI, § 1.) To assist the Supreme Court in the administration of the admission process, the Board of Governors of the State Bar, pursuant to sections 6046 and 6046.5 of the Business and Professions Code, has appointed the Committee of Bar Examiners to have primary responsibility for the Bar Examination process and to act as the administrative arm of the California Supreme Court in admission matters. (In re Investigation

of Conduct of Examination for Admission to Practice Law (1934) 1 Cal. 2d 61, 67; Chaney v. State Bar of California (9th Cir. 1967) 386 F.2d 962, 966.)

In that regard, the Committee has the power to: (a) examine all applicants for admission; (b) administer the requirements for admission to practice; and (c) certify to the California Supreme Court for admission those applicants who fulfill the requirements. (Bus. & Prof. Code, §§ 6046, 6060 and 6064; Cal. Rules of Court, rule 952(d); Rules Regulating Admission to Practice Law, rule I, § 2 West Supp. 1994).) Moreover the Committee has the power to adopt such reasonable rules and regulations as may be necessary or advisable for the purpose of making effective the requirements for admission. (Bus. & Prof. Code, § 6047.)

The Committee is the only agency charged with the administration of the Bar Examination. As such, its interpretation of and consequent actions in carrying out its duties are entitled to great weight unless clearly erroneous.

(In re Kelly (1983) 33 Cal. 3d 267, 277; Rivera v. City of Fresno (1971) 6 Cal. 3d 132, 140.) Petitioner has failed to demonstrate that the Committee's actions were erroneous. Moreover, it has been held that the inability of one applicant to pass examinations that are successfully passed by other applicants will not be inquired into by the Court. (In re Investigation of Conduct of Examination for Admission to Practice Law, supra, 1 Cal. 2d at 64; see also Johnson v. State Bar (1968) 268 Cal.App. 2d 437, 444.) Clearly, some applicants passed both the June and October 1994 FYLSX. Therefore, this Court should deny Petitioner's request to inquire further into Petitioner's inability to pass the Examination.

B. Petitioner's Right to Due Process Was Not Violated

Petitioner contends that his due process rights were violated because he was not provided with a hearing in this matter. (Petition, p. 4) By statute, an unsuccessful applicant can inspect his examination (Bus. & Prof. Code

§6065). Further, applicants who are refused certification to the Supreme Court for admission to practice can petition the Supreme Court, as Petitioner has, for further review. (See, Bus. & Prof. Code §6066.) Moreover, Petitioner's unqualified right to retake the examination further satisfies due process. (Tyler v. Vickery (5th Cir. 1975) 517 F.2d 1089, 1103, cert. den. 426 U.S. 940 (1976).) Therefore, there is no viable due process claim advanced by Petitioner.

2. The First Year Law Students Exam Has Been Upheld As Constitutional By The California Supreme Court And Is Not In Contravention of The Equal Protection Clause

The requirements for admission are delineated in Business and Professions Code, section 6060. Not only do those rules require that an applicant be of age and have good moral character, but also that he or she meet the educational requirements and procedural safeguards implemented especially for non-accredited law schools and correspondence schools. (Bus. & Prof. Code, § 6060(e).) In its rules, the Committee also specifically sets forth

certain educational requirements. (Rule VII, §§ 5, 6 and 8 (West Supp. 1994).)

Included in both the Business and Professions Code and the Committee's rules is the requirement that first year students at non-accredited law schools take and pass the FYLSX. (Bus. & Prof. Code, § 6060(g); Rules Regulating Admission to Practice Law, Rule VI (West Supp. 1994).)

In approving and upholding the constitutionality of the FYLSX, the California Supreme Court has enunciated the strong public policy justifying this requirement. (Bib'le v. Committee of Bar Examiners (1980) 26 Cal. 3d 548, 554, cert. denied, 559 U.S. 860 (1980).) Indeed, one of the primary purposes of the FYLSX is to give applicants some indication of the quality of their education, so they can measure their likelihood of success on the general bar exam. (Bib'le, 26 Cal.3d at 554.) "Such policy will surely be frustrated if the committee can be estopped from requiring an applicant to take and pass the FYLSX when that applicant is not exempt therefrom." (Id.)

The present case is substantially similar to the situation in Lupert v. California State Bar (9th Cir. 1985) 761 F.2d 1325, cert. denied, 474 U.S. 916 (1985). In Lupert, the plaintiff challenged the constitutionality of Business & Professions Code, section 6060(g) alleging that the statute discriminated based on the "status" of law students. In rejecting plaintiff's claim and upholding the constitutionality of the FYLSX the Lupert court relied on the reasoning set forth by the California Supreme Court in Bib'le, holding that the strong public policy underlying the FYLSX exam:

> both protects persons from continuing to pursue a profession for which they are not qualified, and aids qualified persons in judging the quality of the training and education they are receiving in preparation for the bar examination. Not only are these legitimate state interests but there is a rational basis for the different treatment of students receiving instruction at accredited and unaccredited schools because the committee, by setting standards for accreditation, can impose minimum standards on the quality of education at accredited schools.

(Id. at 555.)

Petitioner's contentions that Respondent has "deprived [him] of obtaining a legal education at Oakland College of Law" are without merit. As a non-accredited law school student, Petitioner is not exempt from the requirement of taking the FYLSX. In order to receive credit for his first year of study, or any subsequent work, he must take and pass the FYLSX. By requiring Petitioner to take and pass the FYLSX, Respondent is in no way discriminating against him or preventing him from obtaining a legal education. Petitioner may still continue to pursue his studies and complete the Juris Doctor program at Oakland College of Law, only his earned units will not at this time be credited toward acceptance to practice law in California.

3. The Committee Complied With Established First Year Law Student's Examination Grading And Scaling Procedures

In 1986, the State Bar Act was amended to specifically permit scaling to be used on both the General Bar Examination and the First Year Law Students

Examination, for the purpose of maintaining an examination of uniform difficulty from year to year. (Bus. & Prof. Code, § 6046.6.) Since the multiple-choice portions of both the GBE and the FYLSX are "equated" exams (the scores of which are adjusted to control exam-to-exam variations in test difficulty), converting the written section scores to the multiple-choice scale results in an overall exam that remains at a constant level of difficulty, regardless of differences in the degree of difficulty of the questions from exam to exam and differences in the leniency of the grading from one exam to the next. (See Declaration of Stephen P. Klein pp. 4-5, hereafter "Klein Declaration" attached as "Appendix A" hereto.)[1]

Following the amendment to the State Bar Act, the State Bar's Committee of Bar Examiners, with guidance from an expert in the field, in February 1987 instituted a grading procedure for the General Bar Exam (GBE) that

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[1] The declaration was contained in the record before the lifornia Supreme Court.

included the scaling of the scores on the multiple choice, or multi-state bar exam (MBE) portion of the exam. The scaling of scores necessarily involves the multiplication of, as well as subtraction from, and/or addition to, the raw scores obtained on the MBE sections of the exam. Such manipulation of the raw scores is inherent in the very definition of equating exam scores. The multiple choice portion of the FYLSX is scaled in accordance with the same scaling procedures used on the MBE portion of the GBE, except that MBE raw score are converted to a 2,000 point scale whereas FYLSX multiple choice scores are converted to a 400 point scale. (Klein Declaration, pp. 7-8.)

The First Year Law Students Exam is given in June and October of each year. An applicant may sit for the examination as many times as desired until it is passed. Petitioner took and failed to pass the FYLSX in both June of 1994 and October of 1994.

The examinations which Petitioner took consisted of four essay and one hundred multiple-choice questions on contracts, torts and criminal law. The maximum score possible on each portion of the examinations was 400 points, with a total possible score of 800 points. In order to pass either the June 1994 FYLSX or the October 1994 FYLSX, it was necessary to receive a total scaled score of 560 points or 70% of 800. Petitioner received a failing total scaled score of 537.4300 on the June 1994 FYLSX and a failing total scaled score of 537.5000 on the October 1994 FYLSX.

If an applicant does not pass the FYLSX but receives a total scaled score of 540 points or more, the applicant's essay answers are automatically reappraised by an independent reappraiser as a routine part of the grading process. Petitioner did not receive a high enough score on either the June 1994 FYLSX or the October 1994 FYLSX to be eligible for a reappraisal of his essay answers.

Petitioner contends that the scaling formula used on the FYLSX is unfair as compared to the scaling formula used on the GBE, and that if the GBE scaling formula was applied to his FYLSX raw score, he would have passed the exam. As pointed out in the Declaration of Stephen P. Klein ("Appendix A"), this contention is erroneous and reveals a fundamental misunderstanding of the function of scaling and equating of examination scores. (Klein Declaration, pp. 11-13.) Petitioner offers no substantiation for his version of how a passing grade for the FYLSX should be calculated, and he has failed to show that the State Bar's procedures are erroneous. Petitioner and other FYLSX examinees have not been disadvantaged by this procedure. Rather, the procedure ensures the integrity of the exam and maintains the high competence level of successful applicants from exam to exam.

CONCLUSION

Petitioner has failed to present any facts to support his request for a writ of certiorari, nor has he demonstrated that any of the actions taken by Respondent in connection with his case were improper. For these and all of the foregoing reasons, Respondent the State Bar respectfully requests this Court to deny the petition for writ of certiorari.

DATED: February 9, 1996

Respectfully submitted,

DIANE C. YU
RICHARD J. ZANASSI
COLIN P. WONG

By: _____
Colin P. Wong
Attorneys for Respondent
The State Bar of California

APPENDIX A

Declaration of Stephen P. Klein

1. I hold a B.S. degree in Psychology from Tufts University and an M.S. and Ph.D. from Purdue University in Industrial Psychology with minors in Experimental Design and Tests and Measurement.

2. I have served as a consultant to the Committee of Bar Examiners of the State Bar of California (hereafter referred to as "the Committee") for over 20 years. I also have served as a consultant on testing matters to the National Conference of Bar Examiners, over 20 state boards of bar examiners, other professional licensing and certification agencies, the National Science Foundation, and the National Academy of Sciences.

3. I served as a Research Psychologist with the Educational Testing Service in Princeton, New Jersey and as an Associate Professor in Residence in the Graduate School of Education at the University of California, Los Angeles where I was chairman of the Research Methods

division. I taught courses at UCLA in the fields of research design, tests and measurement, and statistics.

4. I am currently a Senior Research Scientist with RAND in Santa Monica, California. I have been an expert witness in both state and federal courts and at administrative hearings on matters dealing with statistical analysis and testing.

5. I have read the PETITION FOR REVIEW prepared by KENNETH OWEN (the Petitioner). The remainder of this declaration discusses errors in the Petitioner's statements and conclusions. To facilitate an understanding of the defects in his arguments, I have divided this discussion into four parts. Part I summarizes the procedures that are used to compute scores and make pass/fail decisions on the First Year Law Students Examination (hereafter referred to as the "the FYLSX"). Part II discusses how and why "raw" scores on the multiple choice section are converted to "scale" scores. Part III

reviews how scores on the General Bar Exam (GBE) are scaled because the Petitioner has asked the court to apply these same procedures to the FYLSX. Part IV discusses why the Petitioner's proposed procedures violate the principles underlying scaling and do not correspond to the ones used on the GBE, and why applying the full GBE method to the FYLSX would lead to his receiving a lower rather than a higher FYLSX scale score.

Part I: The FYLSX

6. The FYLSX has two parts, a four-question essay test and a lOO-item multiple choice test. A candidate can earn up to 100 points on an essay question.

7. A candidate's multiple choice **"raw"** score is the number of questions answered correctly. Raw scores are converted to **"scale"** scores with an equation that takes the following form: Scale Score = (a)(Raw Score) + b. For example, the formula for the October 1994 exam was: Scale Score = (3.5)(Raw Score) + 37. Thus, a candidate with a raw score of 62 on this test (which is about average)

would earn a scale score of 254 (a different formula is used for converting raw scores over 85). The maximum possible multiple choice scale score is 400 points.

8. Because a candidate can earn up to 400 points per section, the maximum possible total score is 800 points. The Rules Regulating Admission to Practice Law in California state that "the passing grade shall be 70% of the highest possible grade" (Rule VIII, Section lb). In accordance with this rule, candidates must receive a total score of 560 or higher in order to pass (i.e., 70% of 800).

9. Candidates cannot pass overall by passing one section on one administration of the exam and the other section on a different administration. Indeed, there is no such thing as passing a section. Pass/fail decisions are based solely on total grades. Thus, the 70% rule only applies to the total score. It does not apply to each section of the exam.

Part II: Scaling

10. The formula that is used to adjust the raw scores on each form of the multiple choice test is derived using a standard statistical procedure that is often called "scaling" (the technically correct term is "equating"). This procedure compensates for possible variation in the average difficulty of the different forms (versions) of this test. For example, scaling adjusts for the fact that the form used on a one administration of the FYLSX may contain generally harder or easier items than those asked on a previous or subsequent exam. Thus, the Committee increases the fairness of the grading process by using scaling to adjust for these differences in test difficulty.

11. The procedures used to scale the multiple choice portion of the FYLSX correspond to those used to scale scores on other major tests, such as the Multistate Bar Examination (MBE) and the Law School Admission Test (LSAT). These procedures involve sprinkling into a given version of a test a set of questions that have been used in

the past and which have also been calibrated to a benchmark exam. In other words, each version of the test contains two types of items, those that are unique to that version and those that have been calibrated to the benchmark (the latter set are called "equators"). If the candidates taking a given form generally score higher on the repeated items than did the candidates who answered those same questions on the benchmark exam, then the scores on the new form are adjusted upwards so that the group taking it receives a higher mean adjusted score than the group who took the benchmark test. Conversely, if those taking the new version do less well on the repeated items than those who took those same items in the past, then the new group will have a lower mean adjusted score than the previous group.

12. The logic underlying scaling is simple. Specifically, if two groups do equally well when asked the same questions (i.e., the repeated items), then these groups are performing at the same level of proficiency and

therefore should have the same mean scale score. Any difference in their total "raw" scores (number of questions answered correctly) across all the items in their respective versions of the test (i.e., repeated + unique items) must be due to differences in the average difficulty of their respective sets of unique items. Similarly, if one group has a higher average score on the repeated items than the other group, then equating makes sure this difference is reflected in their respective scale scores. In short, *scaling increases the fairness of the testing process by adjusting for any differences in mean raw scores between groups that stems from one group taking a generally harder version of the test than some other group.*

Part III: The General Bar Examination (GBE)

13. The General Bar Examination (hereafter called the GBE to be consistent with the Petitioner's terminology) consists of the MBE (a 200-item multiple choice test) and a written section composed of six essay questions and two performance test problems.

14. MBE raw scores (i.e., number of items answered correctly) are converted to scale scores using a formula that takes the following form: Scale = a(raw score) + b. The procedures for computing the values of "a" and "b" in this formula correspond with those used to derive the scaling formula for the multiple choice portion of the FYLSX. The rationale also is the same; i.e., adjusting for possible differences in test difficulty across administrations. However, MBE raw scores are converted to a 2,000 point scale whereas FYLSX multiple choice scores are converted to a 400 point scale. Because no two versions of the MBE are identical, there is a separate scaling equation (i.e., values of "a" and "b") for each administration of this exam.

15. Total raw written scores are converted to the same scale of measurement as that used on the MBE. The formula for doing this is: Scaled Written = [(A - B)/C][D] + E where A is the candidate's raw written score, B is the mean of the written scores across all the candidates who

took the exam, C is the standard deviation of these scores, and D and E correspond to the standard deviation and mean of these candidates' scaled MBE scores. The values of B, C, D, and E in this formula change with each administration of the exam.

16. An applicant's total GBE score equals .35 times the MBE scale score plus .65 times the Written scale score. Applicants need a total scale score of 1440 or higher to pass.

Part IV: The Petitioner's Request

17. The Petitioner says that "Scaling formulas applied to the multiple-choice portion of the FYLSX will result in scores that are on average scaled DOWNWARD by more than 3%. Scaling formulas applied to the multiple choice portion of the GBE will result in scores that are scaled UPWARD by more than 9%. Scaling formulas applied to the written portion of the GBE result in scores that are on average scaled UPWARD by more than 9%" (Page 4, Section B with original emphasis).

18. It appears the Petitioner computed his measure of the "upward" or "downward" effect of scaling on a section by comparing the percentages from Formulas #1 and #2 below for a given raw score on that section.

$$\text{(\#1) Raw Score \%} = \frac{\text{Candidate's Raw Score}}{\text{Total Possible Raw Score}} \times 100$$

$$\text{(\#2) Scale Score \%} = \frac{\text{Candidate's Corresponding Scale Score}}{\text{Total Possible Scale Score}} \times 100$$

19. The Petitioner apparently believes an UPWARD effect occurs when the value from Formula #2 is greater than it is from Formula #1 and a DOWNWARD effect occurs when the opposite is true. According to this logic, a NEUTRAL effect occurs when Formulas #1 and #2 yield the same value for a given raw score. Nevertheless, the Petitioner wants the Committee to compute FYLSX

multiple choice scale scores so that the Formula #2 value for a given raw score is larger than the Formula # I value.

20. The sum total of the Petitioner's rationale for his request is that on the GBE, the Formula #2 value is generally larger than the Formula #1 value. His observation about the relative sizes of the Formula #1 and #2 values on the GBE is correct, but meaningless. It is meaningless because these formulas are not used on the GBE and they ignore the whole reason for scaling, namely, adjusting raw scores across tests for possible differences in the difficulty of their questions. The Petitioner's proposed procedure does not control for such differences in test difficulty. The only effect of his proposed method for computing scores is that it would make it easier to pass a current version of the FYLSX than a version that was given in the past. In other words, his proposal would negate and frustrate the whole purpose of scaling.

21. The Petitioner's proposal is based on the assumption that the difference in percentages between

Formulas #1 and #2 on the GBE is constant. That assumption is false. This percentage not only changes from exam-to-exam, but also within an exam (i.e., the size of the difference between the two percentages varies as a function of the magnitude of the raw score being converted). Thus, his proposal cannot be implemented.

22. The Petitioner has asked the court "to apply GBE scaling formulas to Petitioner's June 1994 FYLSX' scores (pages 4-5). The Petitioner believes this will result in his earning a higher score. The Petitioner's request does not make sense. As per the discussion in Part III, the values of "a" and "b" in the formula the Committee uses to convert MBE raw scores to scale scores changes with each exam. There is no one formula that is applied to all exams.

23. Moreover, even if there was a single formula, the Petitioner's request is illogical because the equation for a given MBE converts scores to a very different scale of measurement than the one used on FYLSX. For example, a score of 560 on FYLSX (70% of the maximum) in no way

corresponds to the same level of proficiency as a score of 1400 (let alone 1440) on the GBE.

24. One could, of course, scale the FYLSX essay scores that are earned on a given administration to these same candidates' scaled FYLSX multiple choice scores. This procedure would use the formula in paragraph 15 above and therefore correspond directly with the method that is used to scale written raw scores on the GBE. However, this plan would have the exact opposite effect than the one the Petitioner desires. Specifically, it would lower FYLSX total scores for all candidates (including the Petitioner) and thereby lower their passing rate. This would occur because on average, the mean total raw FYLSX essay score on a given administration is greater than the mean FYLSX multiple choice scale score on that administration.

25. In sum, the Petitioner's request is without merit because it would violate the very principles underlying scaling, it cannot be implemented because it is based on erroneous assumptions about the scaling equations, and his

proposal to use the GBE's methods on the FYLSX would lead to Ms receiving a lower rather than a higher score.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Santa Monica, California on May 30, 1995.

"s/Stephen P. Klein"

Stephen P. Klein, Ph.D.

(3)

No. 95-1104

Supreme Court, U.S.
FILED
MAR 5 1996
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

KENNETH J. OWEN,

Petitioner,

v.

THE STATE BAR OF CALIFORNIA AND
THE COMMITTEE OF BAR EXAMINERS,

Respondent.

On Petition For Writ Of Certiorari
To The
SUPREME COURT OF CALIFORNIA

REPLY TO BRIEF IN OPPOSITION

KENNETH J. OWEN
IN PRO PER
6098 Slopeview Court
Castro Valley, CA 94552
Telephone: (510) 582-0540

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ARTIFICE I

Counsel for The State Bar deliberately misstated to this Court Business & Professions Code section 6046.6(d) in order to prevail with regard to Petitioner's contention that it is illegal to scale the FYLSX.

Counsel stated that"In 1986, the State Bar Act was amended to specifically permit scaling to be used on both the General Bar Examination and the First Year Law Students Examination, for the purpose of maintaining and examination of uniform difficulty from year to year.(Bus.& Prof. Code, section 6046.6)" (emphasis added) (Brief for Respondent in Opposition, p.11, 12)

Business & Professions Code section 6046.6(d) provides:

> Scaling may be used on the bar examination for the purpose of maintaining an examination of uniform difficulty from year to year. (added by Stats. 1986, c. 1392, section 3)

Business & Professions Code section 6068(d) provides:

> It is the duty of an attorney:
> (d) To employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

Counsel for State Bar intentionally misled this Court by misstating the law in order to gain an advantage. This amounts to a fraud upon this Court, and pursuant to California Law, subjects counsel to disbarment or suspension.

> But when in a disbarment proceeding it is established by evidence amounting to proof that an attorney and counselor has deliberately been

> dishonest in dealing with the affairs of his client, and has violated the duty which he owes to "never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law" (sec.282, subd.4, Code Civ. Proc.), and when judgment of the Supreme Court is invoked upon such facts, then a refusal to order disbarment amounts to a renewal of the original license, and is a declaration that in spite of his own record, the attorney is fit to be offered to the public as one who safely may be trusted. In this case the court has no reasonable alternative. The petitioner has disbarred himself.(emphasis added)
>
> Roark v. State Bar
>
> 5 Cal.2d 665, 668-69 (Cal. 1936)

Counsel for State Bar also misled the Supreme Court of the State of California by deliberately misstating Business & Professions Code section 6046.6(d) in its Brief for Respondent In Opposition to Petition For Writ of Review, page 8. (Dated: May 30, 1995) If the Supreme Court of the State of California relied on Counsel's misrepresentation, then Petitioner's inability to practice law is a direct result of Counsel's wilful disobediance of his duties.

Counsel for The State Bar should be held to the highest of professional standards, as they represent the administrative arm of the Supreme Court of the State of California. Counsels' actions should result in their disbarment.

ARTIFICE II

Counsel for The State Bar again misled this Court by stating that "In order to pass either the June 1994 FYLSX or the

October 1994 FYLSX, it was necessary to receive a total scaled score of 560 points or 70%of 800."(emphasis added) (Brief for Respondent in Opposition,p.14) There are no published rules stating that a total scaled score of 70% is required to pass the FYLSX.

The Rules Regulating Admission to Practice Law in California as well as the Instructions for Applicants First Year Law Students' Examination state that a 70% is a passing grade on the FYLSX. See Rule VIII section 1(b). This would be true if the actual scores were not arbitrarily scaled DOWNWARD by the Committee.

In choosing to attend Oakland College of Law, Petitioner knew that passing the FYLSX was a requirement for taking the General Bar Examination. Petitioner reasonably relied on the representation of the Committee of Bar Examiners that a 70% was a passing grade.

A 70% would seem to be a realistic score that is easily achievable by a student who studies hard, makes the Dean's List of Honor Students, takes a bar review course, and takes considerable time off from work to prepare for the FYLSX. Petitioner was therefore completely surprised to find that the Committee arbitrarily scaled his score downward by 16.57 points. Petitioner was also surprised to discover that General Bar Applicants are given significantly more time to answer similar essay questions.

The Committee has committed fraud by misrepresenting the passing score for the FYLSX. Petitioner reasonably relied on this misrepresentation, and as a result has suffered damages. This is like winning the Super Bowl by 3 points, and then having the National Football League scale your score downward by 7 points because your a better team.

ARTIFICE III

Petitioner made two requests for evidence to support his contentions that the Committee was arbitrarily fabricating the scaling formulas for the FYLSX without any regard to established mathematical principles.

"I therefore request the mean and standard deviation carry-over numbers for the June 1986 FYLSX through the October 1994 FYLSX's. This evidence will either prove or disprove my allegations." (Letter to Adam S. Ferber, dated April 9, 1995.) Mr. Ferber responded on behalf of the Committee by letter dated April 12, 1995, denying Petitioner's request.

On August 11, 1995, Petitioner again wrote to Adam Ferber requesting evidence to support his Petition to the Supreme Court. The letter stated in part:

> I currently have a Petition for Review before the California Supreme Court from the Denial of Committee of Bar Examiners to Certify Applicant as having passed the First Year Law Students Examination. (Case Number SO46472)
>
> It should be apparent that the requested information is extremely relevant in supporting my position in this matter. All scaling formulas for the FYLSX as well as the General Bar Examination are public information. It seems only logical that the numbers used to arrive at these scaling formulas can be provided without violating any law.
>
> As the United States Supreme Court stated in United States v. Proctor & Gamble,"Modern instruments of discovery serve a useful purpose * * *. They together with pretrial procedures make a trial less a game of blindman's bluff and more a fair

contest with the basic issues and facts disclosed to the fullest practicable extent." 356 U.S. 677, 682 (1958).

Counsel for The State Bar responded on behalf of Mr. Ferber by letter dated August 24,1995, essentially denying Petitioner's request. Concealment of material information in these proceedings amounts to a fraud upon the Courts.

> An attorney is obligated to "employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (Bus. & Prof. Code, section 6068, sub. (d); see also rule 7-105, Rules Prof.Conduct, for a similar statement.) The quoted statute "unqualifiedly require[s] an attorney to refrain from acts which mislead or deceive the court." (citation omitted) It is settled that concealment of material facts is just as misleading as explicit false statements, and accordingly, is misconduct calling for discipline. Di Sabatino v. State Bar
> 27 Cal.3d 159, 162-63 (Cal. 1980)

ARTIFICE IV

Dr. Klein's declaration deceives the Courts, and is nothing more than a clever attempt to avoid the issues raised by Petitioner.

Scaling formulas take the "[f]ollowing form: Scale=a(raw score)+b.The procedures for computing the values of "a" and "b" in this formula correspond with those used to derive the scaling formula for the multiple choice portion of the FYLSX." (Klein Declaration, p.8.) Peti-

tioner believes that the procedures for computing the values of "a" and "b" require knowing the raw score mean and standard deviation scores of the previous and current test, as well as knowing the scaling formula for the previous test. With this information, the current scaling formula can be computed. See Chapter 15, Scales, Norms and Equivalent Scores in Educational Measurement (second edition) edited by Robert L. Thorndike (1971, American Council on Education, Washington, D.C., especially pp.562-597).

Petitioner also believes that the first scaling formula in a series is arbitrarily chosen. The values for the first raw score mean and standard deviation numbers are arbitrarily chosen and assigned. See Scales, Norms and Equivalent Scores in Educational Measurement at page 513. Perhaps this is why the FYLSX scores are on average scaled DOWNWARD by more than 3% and the GBE scores are on average scaled UPWARD by more than 9%. Dr. Klein has provided no explanation for this significant disparity in scaling formulas between the General Bar Examination and First Year Law Students Examination. A wise move.

Dr. Klein makes a fundamental error in assuming Petitioner is proposing the proper scaling formulas to be used on the FYLSX. Petitioner is simply making observations about the effect of the scaling formulas on the GBE and the FYLSX. Petitioner's proposal for future administrations of the FYLSX is that only three essay questions should be given in a three hour session, as well as the 100 item multiple-choice portion of the test. Scaling should not be applied as there is no legal authority to do so. The overall passing grade should be 65% as this is consistent with the raw scores needed to pass the GBE.

Petitioner stated that applicants taking the GBE are given 14+% more time to answer similar essay questions. The formula is ESSAY = (1.1429 X raw). This is an equitable formula, not a scaling formula. This equitable formula can be applied to any administration of the FYLSX to correct for this unfair time advantage. Applying this formula to Petitioner's written score of June 1994:

Written Equitable Score = (1.1429 X 270)	= 308.5830
+ Illegally Scaled Multiple-Choice	= 267.4300
TOTAL EQUITABLE/SCALED SCORE	= 576.0130

If scaling is not applied to the Multiple-choice portion, then:

Written Equitable Score	= 308.5830
+ Unscaled Multiple-Choice	= 284.0000
TOTAL EQUITABLE SCORE	= 592.5830

Petitioner has not even applied General Bar Examination scaling formulas to raise his score, yet Petitioner's score of 592.5830, which is 74.07% of the total possible grade, is clearly passing. It could be said that Petitioner has a better than average chance of passing the General Bar Examination. "Indeed, one of the primary purposes of the FYLSX is to give applicants some indication of the quality of their education, so they can measure their likelihood of success on the general bar exam. (Bible, 26 Cal.3d at 544.)" (Brief for Respondent in Opposition, p.9)

Perhaps Dr. Klein is responsible for arbitrarily fabricating the scaling formulas on the FYLSX. "Following the amendment to the State Bar Act, the State Bar's Committee of Bar Examiners, with guidance from an expert in the field, in February 1987 instituted a grading

procedure for the General Bar Exam (GBE) that included the scaling of the scores on the multiple choice, or multi-state bar exam (MBE) portion of the exam." (Brief for Respondent in Opposition,p.12-13)

In 1987, a pattern of four arbitrarily chosen FYLSX scaling formulas emerges. See Appendix A. This pattern begins with "guidance from an expert in the field." This expert is more than likely responsible for the arbitrarily chosen FYLSX scaling formulas.

Petitioner can easily predict from Appendix A that the scaling formula for the June 1996 FYLSX will be (3.33xRaw) +31. An applicant taking the June 1996 FYLSX who receives a raw score of 70 (passing) on the multiple-choice portion of the test will end up losing 16 points after the Committee scales his or her score downward. An applicant who receives 70% on the essay portion of the FYLSX and a 70% on the multiple-choice portion of the FYLSX will fail the test.

CONCLUSION

"Petitioner has failed to demonstrate that the Committee's actions were erroneous."(Brief for Respondent in Opposition, p.7) Not only are the Committee's actions erroneous, they are illegal. Counsel for The State Bar has attempted to cover up these actions by deceiving the Courts and withholding evidence.

The Supreme Court of the State of Calfornia had a duty to listen to Petitioner's complaint. "In accordance with our duty to undertake an independent examination of the evidence in cases of this kind (citations omitted), we proceed to a consideration of the record." Siegel v. Committee of Bar Exam.,State Bar of Cal., 10 Cal.3d 156, 160 (Cal. 1973).

"The applicant bears the burden of showing that the committee's findings are not supported by the evidence or 'that its decision or action is erroneous or unlawful,' but all reasonable doubts are to be resolved in his favor. (citations omitted)" Id. at 173.

This case on the merits is quite simple. The Committee has simply rigged the FYLSX by arbitrarily fabricating scaling formulas. The Committee's actions were erroneous, illegal, and fraudulent. The evidence supports this finding.

The actions of Counsel for The State Bar in covering up the Committee's action was also illegal. Given the overwhelming amount of evidence to support Petitioner's position, no administrative agency or court in the State of California has provided Petitioner with the most basic of hearings in this matter.

In a disbarment proceeding, Counsel would no doubt demand a hearing, and would be entitled to procedural due process.

> [A] court may not summarily disbar an attorney without notice and hearing, even when the disbarment results from a charge of contempt for which the court gave the attorney notice,an opportunity to prepare, and a hearing. (citations omitted) Miranda v.Southern Pacific Transp.Co 710 F.2d 516, 522 (9th Cir. 1983)

Petitioner has in effect been summarily disbarred before even getting the chance to practice law. Petitioner should be entitled to procedural due process in this matter, just as Counsel would expect a hearing in a disbarment proceeding.

> Petitioner was clearly entitled to notice of and a hearing on the grounds for his rejection either before the Committee or before the Appellate Division. (citations omit-

ted) There seems no question but that petitioner was apprised of the matters the Committee was considering.

> "But a 'full hearing'--a fair and open hearing--requires more than that. * * * Those who are brought into contest with * * * Government in a quasijudicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."(citations omitted)

Petitioner had no opportunity to ascertain and contest the bases of the Committee's reports to the Appellate Division, and the Appellate Division gave him no separate hearing. Yet, "[t]he requirements of fairness are not exhausted in the taking or consideration of evidence,but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." (citations omitted)

Willner v. Committee on Character and Fitness
373 U.S. 96, 105 (1963)

For the reasons set forth above, a writ of certiorari should issue to review the Order of the Supreme Court of California in this matter.

DATED: March 5, 1996

Respectfully submitted,

Kenneth Owen
KENNETH OWEN

FYLSX MULTIPLE-CHOICE SCALING FORMULAS

FYLSX	SCALING FORMULA	ACTUAL SCORE	SCALED SCORE	SCALED SCORE%
OCT 87	(2.90xR)+64	70	267	66.750%
JUNE 88	(3.33xR)+31	70	264.1	66.025%
OCT 88	(3.50xR)+37	70	282	70.500%
JUNE 89	(2.60xR)+90	70	272	68.000%
OCT 89	(2.90xR)+67	70	270	67.500%
JUNE 90	(3.33xR)+31	70	264.1	66.025%
OCT 90	(3.50xR)+37	70	282	70.500%
JUNE 91	(2.60xR)+90	70	272	68.000%
OCT 91	(2.90xR)+64	70	267	66.750%
JUNE 92	(3.33xR)+31	70	264.1	66.025%
OCT 92	(3.50xR)+37	70	282	70.500%
JUNE 93	(2.60xR)+90	70	272	68.000%
OCT 93	(2.90xR)+64	70	267	66.750%
JUNE 94	(3.33xR)+31	70	264.1	66.025%
OCT 94	(3.50xR)+37	70	282	70.500%

The average scaled score as a percentage in the above fifteen administrations = 67.856%

The scaling process on the FYLSX results in a score that is on average scaled DOWNWARD 3.063%

APPENDIX A